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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 278

ROCK ISLAND MOTOR TRANSIT COMPANY,
Petitioner,

vs.

CONDITIONED AIR CORPORATION,
Respondent.

RESPONDENT'S BRIEF
In Opposition to Petition for Writ of Certiorari.

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OPINION BELOW.

The opinion of the Supreme Court of Iowa is reported at 114 N. W. 2nd 304, and is not, as yet, published in the official Iowa reports. Petition for rehearing was denied.

QUESTIONS PRESENTED.

The questions presented, as asserted by petitioner, fail to express the true issues.

At the trial and prior thereto the petitioner stipulated and conceded that it was liable for the cost of replacing

that portion of the lot of panels which had been destroyed. At the bottom of page 5 of the petition for the writ, petitioner so admits. Therefore question 1 is:

Where a lot of aluminum panels of a single color is partially destroyed in shipment, and where the carrier stipulates it is liable for the cost of restoring to the lot the panels destroyed, and where the shipper despite diligence is unable to fabricate new panels of the same color as that of the original lot, is the carrier liable for the loss occasioned by such difference in color?

As for the second question, petitioner incorrectly includes in its statement of the questions the assertion that the overhead expenses were "not incurred or increased by the necessity for the replacement". Rather, question two is:

Where pursuant to an agreement that the carrier will be liable for the cost of fabricating and replacing panels damaged in shipment, and where the shipper supplies therefor electric power, use of machinery, supervisory services, etc., which expenses are shown on the shipper's books as indirect or overhead expense, is the carrier liable for such expense if fairly computed?

STATEMENT OF THE CASE.

Petitioner's statement of the case is sufficiently accurate subject to making it clear that there was evidence (as shown by the opinion of the Iowa Supreme Court appearing on page 23 et seq. of petition) that certain of the so-called overhead expenses were actually incurred by respondent in fabricating the replacement panels.

REASON FOR DENYING THE WRIT.

In an effort to elevate the case to the level of a question inviting the attention of this Court, petitioner phrases the questions presented as involving an application of Section 20, Par. 11, of the Interstate Commerce Act. But this is not so.

As to question one, the problem involves only fixing the measure of recovery where the carrier agreed it was liable for the cost of replacing the portion of the lot damaged and where the shipper was unable in fabricating to obtain the same color as the original lot. Thus, as pointed out by the Iowa Supreme Court, the rule of Sec. 928 of the Restatement of Torts takes effect. Such rule is:

> "Where a person is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for (a) the difference between the value of the chattel before the harm and the value after the harm or, at the plaintiff's election, the reasonable cost of repair or restoration where feasible, with due allowance for any difference between the original value and the value after repairs, * * *."

As to question two, there is presented only the problem of determining as a matter of damages whether respondent was entitled to recover its incurred overhead expense (power, use of machines, supervisory services, etc.) in fabricating the replacement panels. This involves no federal matter.

In this connection, it is curious that petitioner states on page 21 of its petition that respondent's overhead expense "was not increased one penny by the damage to the shipment". Where petitioner concededly was liable for the respondent's replacement costs, any computation

of such costs necessarily included power, use of machines, supervisory services, etc. And such items under respondent's accounting method were a part of so-called overhead. There is no foundation whatever for petitioner's statement.

Petitioner cites the famous case of **Illinois Central Railroad Co. v. Crail**, 281 U. S. 57, 50 S. Ct. 180, 74 L. ed. 699, and kindred cases. They simply hold that "full actual loss" under Section 20, Par. 11 of the Interstate Commerce Act, does not include profit or loss not incurred. Respondent neither claimed nor was awarded profit or expense not incurred.

CONCLUSION.

Upon the record in this cause it is submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

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